COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-458

COMMONWEALTH

vs.

RHONDA PIERCE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury-waived trial, the defendant was convicted of assault.[1] On appeal, she claims that there was insufficient evidence to support her conviction. We affirm.

When analyzing whether the record evidence is sufficient to support a conviction, an appellate court is not required to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Commonwealth v. Velasquez, 48 Mass. App. Ct. 147, 152 (1999), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). Rather, the relevant "question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

[1] The judge found the defendant not guilty of disorderly conduct, disturbing the peace, resisting arrest, and threatening to commit a crime.

reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson, supra.

When evaluating sufficiency, the evidence must be reviewed with specific reference to the substantive elements of the offense. See Latimore, 378 Mass. at 677-678. Under common law, "an assault is defined as either an attempt to use physical force on another, or as a threat of use of physical force." Commonwealth v. Gorassi, 432 Mass. 244, 248 (2000). "Under the attempted battery theory, the Commonwealth must prove that the defendant intended to commit a battery, took some overt step toward accomplishing that intended battery, and came reasonably close to doing so." Commonwealth v. Melton, 436 Mass. 291, 295 (2002). But an attempted battery does not require proof "that the victim [was] aware of the attempt or [was] put in fear by it." Gorassi, supra. "In the case of a threatened battery type of assault, the Commonwealth must prove that the defendant engaged in 'objectively menacing' conduct with the intent to put the victim in fear of immediate bodily harm." Id., quoting Commonwealth v. Musgrave, 38 Mass. App. Ct. 519, 524 n.7 (1995), S.C., 421 Mass. 610 (1996).

In the light most favorable to the Commonwealth, see Latimore, 378 Mass. at 677, the judge (as the fact finder) was entitled to find the following facts. In the presence of two police officers in the common hallway of an apartment building,

the defendant charged towards the victim at "[f]ull speed" and yelled, "You lying bitch, I'll fucking kill you." While yelling this, the defendant had her fist raised and swung at the victim's head. The intended punch was stopped by one of the officers who grabbed the defendant's hand or arm in mid-punch before she struck the victim. The defendant's hand came close enough to the victim that she could "fe[el] the wind of [the defendant's] fist." The victim was "scared" that she was going to be hit, and because the defendant was "strong."

As illustrated by these facts, in practically quintessential fashion, there was more than sufficient evidence to support the defendant's conviction for assault under either variety of the crime.[2] From the evidence that the defendant threw a punch at the victim, which was thwarted by the police officer's intervention, the fact finder was permitted to conclude that an attempted battery had been accomplished. That is, the Commonwealth proved that the defendant "intended to commit a battery, took [an] overt step toward accomplishing that

[2] To the extent the defendant claims that in the face of a general verdict, the Commonwealth was required to prove both types of assault, she is mistaken. See Commonwealth v. Arias, 78 Mass. Ct. 429, 433 (2010) (special verdict slip not required because alternate methods of committing assault not separate "theories," but merely "overlapping subcategories of a single element" [quotation omitted]). In any event, the Commonwealth's evidence was sufficient on each variety of assault.

. . . battery, and came reasonably close to doing so." Melton, 436 Mass. at 295.

From the evidence that the defendant charged at the victim with her fist raised while denouncing her mendacity, frightening the victim, and threatening the victim's imminent demise, the fact finder could rationally have concluded that an immediate threatened battery had been committed. In other words, the defendant's acts constituted objectively menacing conduct that was intended to put the victim in fear of immediate bodily harm.[3] See Gorassi, 432 Mass. at 248.

Judgment affirmed.

By the Court (Green, C.J., Meade & Singh, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 10, 2019.

[3] The defendant's claims that the evidence was insufficient because there were conflicts in the testimony, or that two police officers were nearby to prevent any harm to the victim from occurring, are without moment. See Jackson, 443 U.S. at 319 (it is "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts").

[4] The panelists are listed in order of seniority.